

No. 1946

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE COLMAN COMPANY (a Corporation),
Appellant,
vs.

T. W. WITHOFT, Trustee in Bankruptcy of the Estate of
FRANK H. SWEENEY, Bankrupt,
Appellee.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District
Court for the Northern District of California.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Debtor's Petition.

[Form 1]

To the Honorable J. J. DE HAVEN, Judge of the
District Court of the United States for the
Northern District of California.

The petition of Frank H. Sweeney, resident of and doing business in the County of San Francisco, District and State of California, and by occupation a haberdasher, respectfully represents: That he has resided and been engaged in business for Six months next immediately preceding the filing of this petition, at San Francisco, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to bankruptcy;

That the Schedule hereto annexed, marked "A," and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Acts;

That the Schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts;

Wherefore, your petitioner prays that he may be adjudged by the Court to be a bankrupt within the purview of said Acts.

FRANK H. SWEENEY,
Petitioner.

JAS. P. SWEENEY & JOS. E. BIEN,
Attorney for Petitioner.

Oath to Petition.

United States of America,
Northern District,
State of California,
County of San Francisco,—ss.

I, Frank H. Sweeney, the petitioning debtor mentioned and described in the foregoing petition, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

FRANK H. SWEENEY,
Petitioner.

Subscribed and sworn to before me this 31 day of March, A. D. 1909.

[Seal] GEORGE PATTISON,
Notary Public in and for the City and County of
San Francisco, State of California.

Filed Mar. 31, 1909, at 40 min, past 2 o'clock P. M.
Jas. P. Brown, Clerk. By John Fouga, Deputy
Clerk.

[Order for Adjudication, Referring Matter to Referee, and Designating Newspaper.]

In the District Court of the United States, Northern District of California.

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

At San Francisco, in said District, on the 1st day of April, 1909, before the said Court in Bankruptcy, the petition of Frank H. Sweeney, that he be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Frank H. Sweeney, is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to Milton J. Green, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Frank H. Sweeney, shall attend before said referee on the 8th day of April, 1909 at his office in San Francisco, California, at 10 o'clock forenoon, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Recorder," a newspaper published in the City and County of San Francisco, State of

California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated April 1st, 1909.

JOHN J. DE HAVEN,
District Judge.

[Endorsed]: Filed Apr. 1, 1909, at 11 o'clock and 55 minutes A. M. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Affidavit of Colman Co.]

*In the District Court of the United States, for the
Northern District of California.*

In the Matter of FRANK H. SWEENEY,
A Bankrupt.

Claim of Colman Company.

At the City and County of San Francisco, in said District of Northern California, on the 27th day of April, 1909, came Jesse C. Colman, of the City and County of San Francisco, State of California, and made oath and says:

That he is the president and treasurer of Colman Co., a corporation incorporated by and under the laws of the State of California, and doing business in the City and County of San Francisco, State of California, and that as president and treasurer of such corporation he is duly authorized to make this proof, and says that the said Frank H. Sweeney, the person by whom a petition for adjudication in bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to

the said corporation in the sum of \$1375.00, although at the date of the filing of said petition the amount of said debt was not determined; that the consideration of said debt is as follows:

That Frank H. Sweeney and John D. McCarthy were on the 1st day of May, 1906, copartners, doing business in the said City and County of San Francisco under the firm name and style of Sweeney & McCarthy, Inc.; that on the said 1st day of May, 1906, the said copartnership, Sweeney & McCarthy, Inc., and Colman Company did enter into a lease with James S. Webster and N. Bieber, a copy of which lease is hereunto annexed, marked Exhibit "A," and expressly made a part hereof; that subsequently, to wit, in the year 1907, the said John D. McCarthy transferred to the said Frank H. Sweeney all of the interest of him, the said John D. McCarthy, in and to the said copartnership, and the said Frank H. Sweeney thereupon personally assumed all and singular the obligations of said partnership, including the obligation of said lease; that subsequently and prior to February 1st, 1909, the rent provided in said lease was reduced to the sum of \$350 per month;

That on the 28th day of February, 1908, the said Frank H. Sweeney and Colman Co. entered into an agreement, a copy of which is hereunto annexed, marked Exhibit "B," and expressly made a part hereof;

That subsequently, and prior to the 1st day of February, 1909, the said Frank H. Sweeney and said Colman Co. entered into an agreement by the terms

of which it was provided that the Colman Co., by its president, Jesse C. Colman, should negotiate and enter into a contract with James S. Webster and N. Bieber, rescinding said lease, and that as a consideration for the cancellation thereof by James S. Webster and N. Bieber, should agree to pay to said James S. Webster for each and every month of the term provided in said lease remaining after the date of such contract of rescission a sum not to exceed \$100.00; and said contract between Frank H. Sweeney and Colman Co. further provided that said Frank H. Sweeney should pay to said Colman Co. one-half of the amount agreed by Colman Co. to be paid to James S. Webster and N. Bieber as a consideration for the rescission of said contract of lease;

That pursuant to the terms of said lease, said Colman Co. has paid the sum of \$350.00 rent for the month of April, 1909;

That said Colman Co., by its president, Jesse C. Colman, pursuant to the terms of the agreement between Frank H. Sweeney and Colman Co., hereinbefore particularly set forth, has entered into a contract with James S. Webster and N. Bieber, by the terms of which it was provided that the said lease should be cancelled and rescinded, and that the Colman Co. should pay to said N. Bieber the sum of \$1800.00, and to the said James S. Webster the sum of \$600.00, in monthly payments of \$25.00, to commence on the 1st day of May, 1909;

That Colman Co. has on the date hereof paid to the said N. Bieber the said sum of \$1800.00;

That the said Colman Co. has on the date hereof

executed and delivered to the said James S. Webster its obligation to pay the said James S. Webster the sum of \$600.00 in monthly payments of \$25.00, commencing on the 1st day of May, 1909;

That pursuant to the terms of the agreement between Frank H. Sweeney and Colman Co., there is due from Frank H. Sweeney to Colman Co. the sum of \$1200.00;

That no part of said debt of \$1375.00 has been paid; that there are no setoffs or counterclaims to the same or any part thereof;

That said debt was due on the 16th day of April, 1909, although the amount thereof was not then determined, and is evidenced by the exhibits above referred to and by the statement hereto attached, marked Exhibit "C," and made a part hereof;

That said corporation has not, nor has any person by its order, to the knowledge or belief of deponent, for itself, had or received any manner of security of said debt whatsoever; and that no note has been received for such indebtedness, or any part thereof, nor has any judgment been rendered thereon.

COLMAN CO.

By JESSE C. COLMAN,

President and Treasurer.

Subscribed and sworn to before me this 27th day of April, 1909.

[Seal]

O. W. YEARGAIN,

Notary Public in and for the City and County of San Francisco, State of California.

Exhibit "A" [Lease].

THIS LEASE, made the 1st day of May, 1906, between JAMES S. WEBSTER and N. BIEBER as lessors, and the corporation named COLMAN COMPANY and the corporation named SWEENEY and McCARTHY as lessees:

WITNESSETH:

WHEREAS, said James S. Webster is the owner of the premises hereinafter specified and heretofore leased said premises to said N. Bieber, and

WHEREAS, said James S. Webster and said N. Bieber, acting concurrently, each according to his rights, desire to join in executing these presents as a new lease of said premises to the lessees aforesaid upon the terms hereinafter specified;

NOW, THEREFORE, said lessors hereby acknowledge that they have leased and demised and by these presents do lease and demise unto the lessees aforesaid, and said lessees acknowledge that they have hired and taken and by these presents do hire and take of and from said lessors, the following described premises situated in the City and County of San Francisco, in the State of California, viz.:

The certain store contained in the building named SAINT MUNGO BUILDING, situated on the Northwest corner of Golden Gate Avenue and Fillmore Street, in the City and County of San Francisco, State of California, said store being generally known and designated as Numbers 1101 and 1103 Fillmore Street, the same having a floor space of about Twenty-four (24) feet by Forty-seven (47)

feet more or less; for the term of five (5) years from May 1st, 1906, to May 1st, 1911, for the total rent or sum of Twenty-seven thousand Dollars (\$27,000.00) payable in advance in monthly instalments of Four hundred and fifty Dollars (\$450.00) each, on the 1st day of every month, commencing May 1st, 1906, to said lessors as follow, to wit: Two Hundred and Fifty Dollars (\$250.00) of said rental shall be payable monthly as aforesaid to said lessor N. Bieber and Two Hundred Dollars (\$200.00) of said rental shall be payable monthly as aforesaid, to said lessor James S. Webster.

It is mutually agreed that the above letting and taking is upon the following terms and conditions:

1st. That the premises hereby leased are to be used and occupied by the lessee for use as a store or stores for the sale of Mens' and Boys' Clothing, Furnishing Goods, Hats and Mens' Shoes, and for other *purpose* except those prohibited by paragraph 11 of this lease, without the written consent of the lessor; that the lessee shall not sublet the said premises, nor assign this lease nor any rights thereunder without the written consent of the lessor except as hereinafter specified, and that no goods or merchandise shall be kept, stored or sold in said premises which are in any way hazardous or which will increase the present rate of insurance upon the building in which said demised premises are situated.

2nd. That the premises are now in a tenantable and good condition and that they shall be kept in good condition by and at the expense of the lessees during this lease; that they shall not be altered or

repaired without the written consent of the lessors, and that, unless otherwise provided by written agreement, all alterations, repairs and improvements that may be required by the lessees shall be done only by the written consent of the lessors, first had and obtained, but at the cost of the lessees; that all such alterations, repairs, additions or improvements (except trade fixtures, counters, shelving and movable partitions placed therein by the lessees for the requirements of their business), shall, unless otherwise provided by written agreement, be the property of the lessor James S. Webster, and shall remain upon and be surrendered with the premises upon the expiration of this lease; that all damage or injury done to the premises hereby leased, or to said Saint Mungo Building or to any property therein, by the lessees or by any person who may be in or upon the demised premises with the consent of the lessees from any cause whatsoever (damage by the elements excepted) shall be paid for by the lessees on demand; the lessees and every person claiming under them hereby waive all claims against the lessor for damages to the fixtures, goods and effects of every kind, contained in said demised premises, from any cause whatsoever; and agree that the lessees and all persons acting at their instance, permission, sufferance or neglect, shall at the termination of this lease surrender the demised premises to the lessor James S. Webster in as good condition as reasonable and proper use thereof will permit.

3rd. That the lessees agree to replace at their expense at any time during the existence of this lease,

or upon its termination, any and all window and skylight glasses, or gas or electric light globes, owned by the lessors in said demised premises, that may be broken during their occupancy of said premises, and the said lessees hereby acknowledge that all of the skylight glasses, gas and electric light globes now in said demised premises, owned by the lessor, are in good condition at the commencement of this lease.

4th. That all bills for water, gas and electricity furnished to said demised premises shall be paid by the lessees.

5th. That no signs nor placards shall be placed upon the exterior of the building nor upon the stairs, nor in the hallways or vestibules in which the herein demised premises are situated nor upon the entrance doors, windows or vestibules of the premises herein leased without the written consent of the lessor first had and obtained, except only that said lessees may affix to the premises hereby leased and maintain over the sidewalk adjoining the same, such proper electric signs as may be unobjectionable in character and permitted by the public authorities, and the customary window-signs.

6th. That if the building on the above-described premises shall be destroyed by fire or other cause, or be so damaged thereby as to be untenable and it cannot be rendered tenantable within thirty days from the day of the injury, this lease shall be deemed terminated by such destruction or damage of said premises; but that in case the premises are so damaged as not to require a termination of the lease as above provided, the lessor James S. Webster agrees

to restore the same at his expense within thirty days from the injury, (unless prevented by strikes or other cause beyond the control of the lessor) and the lessees shall not pay the rent herein specified during the term that the premises are being restored; but shall upon the restoration thereof pay the rent from the date of said restoration at the same monthly rent as above provided.

7th. That in case the lessors prevail in any suit brought against the said lessees or any person or persons claiming under them or at their instance, permission, sufferance or neglect for the violation of any of the covenants of this lease or for the recovery of possession of said demised premises, the lessees shall on demand pay to the lessors for the fees of their attorney in such suit the sum of \$100.00; and said amount shall be taxed as a part of the costs of such suit.

8th. That the lessor and his representatives shall have the right which is hereby granted to enter the herein demised premises at any time during the term of this lease to ascertain the condition of the premises and for any other purposes incidental to the rights of the lessors; and it is further agreed that the lessees shall permit the lessors or their agent to enter upon and show the premises to persons wishing to rent or lease the same and allow the usual notice "To Let" or "To Lease" to be placed upon the premises for 30 days next preceding the expiration of this lease and permit such notice to remain thereon without hindrance or molestation on the part of the lessees or anyone in their employ, for said thirty days.

9th. That the said lessees agree that in the event of the inability of the lessors to deliver possession of said demised premises at the time herein agreed, then the lessors shall not be liable for any damages thereby nor shall this lease be void or voidable, but in such event the lessees shall not be liable for any rent until such time as the said lessors can deliver possession of the herein demised premises.

10th. That in case the said lessees shall hold over the said premises beyond the term herein provided, without the written consent of the lessors such holding over shall be deemed merely a tenancy from month to month, and at the monthly rental of Nine Hundred Dollars (\$900.00) payable monthly in advance on the first day of each month.

11th. Said lessees shall have permission to sublet said premises for part or all of the term hereinabove specified but only to tenants who shall and will use the same for the purposes of a general merchandise business but not for the purposes of a bakery, butcher-shop, saloon, restaurant, wine or liquor establishment, or place where cooking is done or objectionable operations conducted, nor for any business unauthorized by law or that is of the same general character as that conducted by any other tenant in said SAINT MUNGO BUILDING. If said lessees shall sublet all or part of the premises hereby leased contrary to this provision, or if said lessees or any subtenant or other person acting at their instance or by their permission, consent, sufferance or neglect, shall use part or all of the premises hereby leased contrary to this provision, then and

thereupon this lease shall forthwith be concluded and stand terminated at the option of said lessors.

That the words "lessors" and "lessees" as herein used, include, apply to, and bind and benefit the heirs, executors, administrators, successors and assigns of the lessors and lessees.

In witness whereof, the lessors and lessees have hereunto set their hands in duplicate the day and year first above written.

JAMES S. WEBSTER,
N. BIEBER,
COLEMAN CO.,

Per JESSE C. COLEMAN,

Pres.

SWEENEY & McCARTHY, Inc.
By FRANK H. SWEENEY,
Pres.

Exhibit "B" [Agreement—Sweeney—Colman Co].

THIAS AGREEMENT, made at the City and County of San Francisco, State of California, the 28th day of February, 1908, by and between FRANK H. SWEENEY, of said City and County and State, the party of the first part, and COLMAN COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, the party of the second part,

WITNESSETH:

That whereas on the first day of May, 1906, said Colman Company and Sweeney & McCarthy did lease from James S. Webster and N. Bieber, a certain store situate in San Francisco in the building

named "St. Mungo," situate on the northwest corner of Golden Gate Avenue and Fillmore Street, designated and known as #1101-1103 Fillmore Street, for the term of five (5) years from May 1, 1906, at a monthly rental of four hundred and fifty (\$450) dollars per month; and whereas said Frank H. Sweeney is and at the time of the execution of said lease was a stockholder of said Sweeney & McCarthy; and whereas the rent in said lease provided to be paid is to be paid jointly by the lessees in said lease named; and whereas, further, it is desirable that each of the parties lessee in and to said lease should hold the other free and harmless from any and all liability in excess of its one-half share of said rent therein reserved, or of the amount to which said rent may be reduced in the future; and whereas said Frank H. Sweeney desires an agreement looking to that end to be made by said Colman Company with him instead with said Sweeney & McCarthy, and said Colman Company desires said agreement to be made with it by said Frank H. Sweeney instead of by said Sweeney & McCarthy,

NOW, THEREFORE, it is agreed by and between said parties as follows, to wit:

The said Colman Company does undertake and agree with the said Frank H. Sweeney that it will hold the said Sweeney & McCarthy free and harmless from any and all liability upon the rent in said lease reserved, or the amount to which it may be reduced in excess of one-half of said rent or said amount to which it may be reduced, and the said Frank H. Sweeney in turn does undertake and agree to hold

the said Colman Company free and harmless from any and all liability upon the rent in said lease reserved or the amount to which it may be reduced in excess of one-half of said rent, or said amount to which it may be reduced. And said parties hereto agree and undertake, one with the other, as surety to the other against any liability or obligation on said rent so reserved in said lease, or the amount thereof to which it may be reduced, in excess of one-half thereof.

IN WITNESS WHEREOF, the said Colman Company has caused these presents to be subscribed and its corporate name and seal to be hereunto affixed by its President and Secretary thereunto duly authorized, and the said Frank H. Sweeney has hereunto set his hand the day and year first above written.

IN DUPLICATE.

COLMAN COMPANY.

By JESSE C. COLMAN,

President.

By CLARENCE COLMAN,

Secretary.

FRANK H. SWEENEY.

Exhibit "C" [Account].

FRANK H. SWEENEY, To Colman Co. Dr.

April 1, 1909, 1/2 rent of \$350 for store 1105

Fillmore St.....\$175.00

April 27, 1909, 1/2 of \$1800 (the amount paid

to N. Bieber by Colman Co. pursuant to agreement with Frank H.

Sweeney) 900.00

April 27, 1909, 1/2 of \$600.00 (the amount of

obligation of Colman Co. to James S.

Webster pursuant to same agreement).. 300.00

Total \$1375.00

[Endorsed]: Filed 27th day of Apl., 1909, at 1:20 o'clock P. M. M. J. Green, Referee in Bankruptcy, in and for the City and County of San Francisco.

[Trustee's Petition to District Court for Review.]

In the District Court of the United States, for the Northern District of California.

IN BANKRUPTCY—No. 6100.

In the Matter of FRANK H. SWEENEY,

A Bankrupt.

PETITION FOR REVIEW OF ORDER OF REFEREE ALLOWING CLAIM OF COLMAN COMPANY AGAINST THE ESTATE OF SAID BANKRUPT.

To the Honorable District Court of the United States, for the Northern District of California:
Your petitioner, T. W. Withoft, as Trustee in

Bankruptcy of the Estate of said Frank H. Sweeney, represents to the above-named Honorable Court as follows:

Heretofore, on, to wit: the 31st day of March, 1909, said Frank H. Sweeney filed his petition in the above-entitled court, to be adjudged a bankrupt, and thereafter, on, to wit: the 1st day of April, 1909, by an order duly given and made by the said District Court of the United States for the Northern District of California, said Frank H. Sweeney was adjudged a bankrupt, and your petitioner is the duly appointed, qualified and acting Trustee in Bankruptcy of the estate of said bankrupt.

Thereafter, on the 27th day of April, 1909, the Colman Company, a corporation, filed its verified Proof of Claim against the estate of said bankrupt with the Honorable Milton J. Green, Referee in Bankruptcy.

Your petitioner, as the Trustee in Bankruptcy of the estate of said bankrupt, resisted and opposed the allowance of said claim, for the reasons that said claim of said Colman Company did not constitute a provable claim in bankruptcy against the estate of said bankrupt, and that said claim of said Colman Company did not fall within any of the provisions of the Bankrupt Act relating to provable claims, and that the same should, therefore, be expunged and disallowed.

The facts as disclosed by said Proof of Claim of said Colman Company filed with said Referee as aforesaid, and as admitted in the briefs filed in said proceedings, and as conceded on the argument of said

question by the respective counsel before the Honorable Referee, are as follows, to wit:

On the 1st day of May, 1906, said Frank H. Sweeney, the above-named bankrupt, and one McCarthy were co-partners doing business under the firm name and style of Sweeney & McCarthy, Inc., at the City and County of San Francisco, in the State of California.

On said 1st day of May, 1906, said partnership and claimant, Colman Company, as lessees, entered into a contract of lease with James S. Webster and N. Bieber, as lessors, wherein said lessees rented from said lessors a certain store known as Nos. 1101 and 1103 Fillmore Street, in the City and County of San Francisco, State of California, for the term of five years from the 1st day of May, 1906, to the first day of May, 1911, for a total rental of \$2700.00, payable in advance in monthly installments of \$450.00 each on the 1st day of every month, commencing May 1, 1906. Under the terms of said lease the monthly installments of rent therein reserved were made payable to the respective lessors by said lessees, in the following proportions, to wit: \$250.00 to said N. Bieber, and \$200.00 to said James S. Webster.

Subsequently to the execution of said lease, and in the year 1907, said McCarthy, the partner of said Frank H. Sweeney, sold out all his interest in said partnership to said Frank H. Sweeney, and said Frank H. Sweeney assumed all the liabilities of said partnership, including that of said lease.

On the 28th day of February, 1908, an agreement was made and entered into by and between Frank H.

Sweeney and the Colman Company, wherein and whereby each party agreed to hold the other harmless from any and all liability upon the rent reserved in said lease, or of any amount to which said rent might be reduced in excess of one-half of said rent, or of any amount to which the same might be reduced; all as more particularly appears by reference to Exhibit "B," attached to the Proof of Claim of the Colman Company on file herein, to which reference is hereby made.

On the 1st day of February, 1909, the monthly installments of rent were reduced from \$450.00 to \$350.00.

Subsequently to the 28th day of February, 1908, and prior to the 1st day of February, 1909, said Frank H. Sweeney and claimant entered into an agreement whereby the Colman Company, by its president, should negotiate and enter into a contract with the said lessors of the said lease for the rescission of said lease, and under and by virtue of said contract the Colman Company was empowered to pay for each and every month of the term provided in said lease remaining after the date of the rescission thereof, in consideration of said lease being rescinded, a sum not to exceed \$100.00. Said contract further provided that, in consideration of said Colman Company bringing about a rescission of said lease upon the terms in said contract agreed upon, said Sweeney should pay to said Colman Company one-half of the amount agreed to be paid by said Colman Company to said lessors, providing that said rescission was brought about upon the basis of said

Colman Company paying to said lessors, as a consideration for the rescission of said lease, a sum not to exceed \$100.00 per month for each and every month of the term reserved in said lease remaining after the date of the rescission thereof.

Shortly after the adjudication in bankruptcy of said Frank H. Sweeney, a rescission of the said lease was brought about upon the consideration of said Colman Company paying to said Bieber, one of the lessors of said lease, the sum of \$1800.00 cash, and to said Webster, the other of the lessors of said lease, the sum of \$600.00 in monthly payments of \$25.00, to commence on the 1st day of May, 1909.

On the 27th day of April, 1909, said Colman Company, in pursuance of said agreement of rescission, paid to said Bieber the sum of \$1800.00, and on the same date executed to said Webster its obligation to pay \$600.00 in monthly installments of \$25.00 each, commencing May 1, 1909.

On the 1st day of April, 1909, said Colman Company paid to said lessors the installment of rent for the month of April, 1909, amounting to the sum of \$350.00.

The following statements appear in the Proof of Claim presented and filed by said Colman Company as aforesaid, to wit:

“that the said Frank H. Sweeney, the person by whom a petition for an adjudication in bankruptcy has been filed, was at the date of the filing of the said petition, and still is, justly and truly indebted to said corporation (Colman Company) in the sum of \$1375.00, although at the

date of the filing of said petition the amount of said debt was not determined"; (Page 1, Proof of Claim.)

Again,

"That said debt was due on the 16th day of April, 1909, although the amount thereof was not then determined, and is evidenced by the exhibits above referred to, and by the statement hereto attached, marked Exhibit 'C' and made a part hereof."

On the 20th day of July, 1910, the opposition of this petitioner to the allowance of said claim of the Colman Company came on for hearing before the Honorable Milton J. Green, Referee in Bankruptcy, and on said day said Referee duly gave and made an order in said proceeding, allowing the said claim of said Colman Company as a provable debt and claim against the estate of said Frank H. Sweeney.

Your petitioner has duly excepted to said order, and to the whole thereof.

The said Milton J. Green, as Referee in Bankruptcy, in making his said order as aforesaid, erred in the following particulars, to wit:

First. That said Referee erred in that he allowed the claim of said Colman Company against the estate of the above-named bankrupt.

Secondly. That said Referee erred in that he did not disallow said claim.

Thirdly. That said Referee erred in adjudging that said claim was a debt within section 63-a of the Bankruptcy Act, provable against the estate of said bankrupt.

Fourthly. That said Referee erred in not adjudging that said claim was not a debt within section 63-a of the Bankruptcy Act, and not provable against the estate of said bankrupt.

Fifthly. That said Referee erred in not adjudging that said claim was a contingent liability at the time of the filing of said petition in Bankruptcy, and not provable in bankruptcy against the estate of said bankrupt.

Sixthly. That said Referee erred in not adjudging that said claim was not a fixed liability owing at the time of the filing of the petition of said bankrupt, and not provable against the estate of said bankrupt.

Seventhly. That said Referee erred in adjudging that that part of the said claim arising by reason of the payment of the April installment of rent by the Colman Company was a provable debt in bankruptcy against the estate of said bankrupt.

Eighthly. That said Referee erred in not adjudging that that part of the said claim arising by reason of the payment by said Colman Company of the April installment of rent was a contingent liability at the time of the filing of the Petition in Bankruptcy of said bankrupt, and not provable against the estate of said bankrupt.

Ninthly. That said Referee erred in not adjudging that that part of said claim arising out of the payment of the April installment of rent by the Colman Company was not a fixed liability owing at the time of the filing of the Petition in Bankruptcy, and not provable against the estate of said bankrupt.

Tenthly. That said Referee erred in adjudging

that that portion of said claim arising out of the contract relating to the rescission of said lease was a provable debt in bankruptcy against the estate of said bankrupt.

Eleventhly. That said Referee erred in not adjudging that that portion of said claim arising out of said contract relating to the rescission of said lease was a contingent liability at the time of the filing of the Petition in Bankruptcy of said bankrupt, and not provable in bankruptcy against his said estate.

Twelfthly. That said Referee erred in not adjudging that that portion of said claim arising out of the contract relating to the rescission of said lease was not a fixed liability absolutely owing at the time of the filing of said Petition in Bankruptcy, and was not provable against the estate of said Bankrupt.

Wherefore, your petitioner prays that the referee certify the record up to said Court for review, and that said Court review the order of said referee allowing the claim of said Colman Company against the estate of said bankrupt; that said Court reverse the order of said Referee allowing said claim against the estate of said bankrupt, and that it direct the Referee to expunge and disallow said claim; and

that this Court make such further order as is meet in the premises.

Dated this 25th day of July, 1910.

T. W. WITHOFT,

Petitioner and Trustee in Bankruptcy of the Estate
of said Frank H. Sweeney.

J. M. & H. L. ROTHCHILD,
ROTHCHILD, GOLDEN & ROTHCHILD,
JOSEPH KIRK,

Attorneys for Said Petitioner and Trustee in Bank-
ruptcy.

State of California,

City and County of San Francisco,—ss.

T. W. Withoft, Trustee of the estate and effects of Frank H. Sweeney, a bankrupt, the petitioner mentioned and described in the foregoing petition for review of Order of Referee, does hereby make solemn oath that the statements of fact contained in said petition are true to the best of his knowledge and belief.

T. W. WITHOFT.

Subscribed and sworn to before me this 25th day of July, 1910.

[Notarial Seal]

OLIVER DIBBLE,

Notary Public in and for the City and County of
San Francisco, State of California.

Service by receipt of copy of *with* Petition Ad-
mitted this 25th July, 1910.

J. C. MEYERSTEIN,

F.

Attorney Colman Company.

[Endorsed]: Filed July 25, 1910. 10 A. M. M. J. Green, Referee.

*In the District Court of the United States, for the
Northern District of California.*

IN BANKRUPTCY—No. 6100.

In the Matter of FRANK H. SWEENEY,
A Bankrupt.

Stipulation [Re Facts].

For the purpose of having the order of Hon. Milton J. Green, Referee in Bankruptcy, made on the 20th day of July, 1910, in the above-entitled proceeding, allowing the claim of the Colman Company against the estate of the above-named bankrupt, reviewed by the above-entitled Court, IT IS HEREBY STIPULATED as follows:

1. For such purpose, that said Court may consider the facts as set forth in the Petition for Review heretofore filed with said Referee to be true.

2. For such purpose, that said Court may consider the facts set forth in the Proof of Claim of said Colman Company heretofore filed with said Referee to be true, excepting that said Trustee does not stipulate that there was any indebtedness due from said bankrupt to said claimant at the time of the filing of the Petition in Bankruptcy, or at any other time, or that the sum of \$1375.00, the amount of said claim or any other sum, was due or owing from said bankrupt to said claimant, at the time of filing said Petition in Bankruptcy, or at any other time; and with this reservation said Trustee in Bankruptcy stipu-

lates that the facts contained in said Proof of Claim are true.

Dated this 2d day of August, 1910.

J. C. MEYERSTEIN,

Attorney for Claimant.

J. M. & H. L. ROTHCHILD,

Attorneys for Trustee.

[Endorsed]: Filed 3 day of Aug., 1910, at 11 o'clock A. M. M. J. Green, Referee in Bankruptcy, in and for the City and County of San Francisco.

[Report of Referee in Bankruptcy.]

*In District Court of the United States, Northern
District of California.*

IN BANKRUPTCY—No. 6100.

In the Matter of FRANK H. SWEENEY,

Bankrupt,

To the Honorable the Judges of the District Court
of the United States, Northern District of Cali-
fornia:

I, Milton J. Green, referee in bankruptcy of the
above-entitled court, do hereby certify:

That in the course of the proceedings in said cause
before me the following question arose pertinent to
said proceedings;

A proof of debt was presented against said bank-
rupt by Colman Company in the sum of \$1,375,
which proof of debt is herewith transmitted. Ob-
jections were made by the trustee to the allowance
of said claim, and a hearing was had thereon. The
evidence relating thereto is shown by petition for re-

view herewith transmitted. The matter was argued by the respective attorneys for said Colman Company and the trustee, and on the 20th day of July, 1910, the said objections were overruled by me, and it was ordered that said claim be allowed in the amount proven, to wit: \$1,375.

On the 25th day of July, 1910, said trustee filed his petition for review of said order, and said question is hereby certified to the judges for their opinion thereon.

Dated this 11th day of August, 1910.

MILTON J. GREEN,
Referee in Bankruptcy.

[Endorsed]: Filed Aug. 15, 1910, at 3 o'clock and — min. P. M. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Reversing Order of Referee, etc.]

At a stated term of the District Court of the United States of America, in and for the Northern District of California, held at the Courtroom thereof in the City and County of San Francisco, on Monday, the 5th day of December, in the year of our Lord One Thousand Nine Hundred and Ten. Present, The Honorable R. S. BEAN, Judge.

No. 6100.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

The petition for review of the order of the referee made herein on July 20, 1910, allowing the claim of The Colman Company, having been heretofore sub-

mitted to the Court for decision, now after due consideration had thereon, by the Court ordered that said order be and the same is hereby reversed and the exceptions to said order sustained.

[Petition for Appeal.]

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,

Bankrupt,

Colman Company, a corporation, and a creditor of the above-entitled bankrupt, conceiving itself aggrieved by the order given and made by the above-entitled court on the 5th day of December, 1910, in the above-entitled proceeding, sustained the exceptions of T. W. Withoft, trustee of the estate of the above-named bankrupt, to the order of the Referee in Bankruptcy theretofore made allowing the claim of said Colman Company, a corporation, filed in the above-entitled proceeding, which said order disallows and rejects the claim of said Colman Company, a corporation, does hereby appeal from said order to the Circuit Court of Appeals of the United States for the Ninth Circuit, and prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Circuit

Court of Appeals of the United States for the Ninth Circuit.

JOSEPH C. MEYERSTEIN,
Attorney for Colman Company, a Corporation, Appellant.

Due service of the within Notice of Appeal, by receipt of a true copy thereof, is hereby acknowledged at the City and County of San Francisco, State of California, in said District, this 15th day of December, A. D. 1910.

ROTHCHILD, GOLDEN & ROTHCHILD, and
JOSEPH KIRK,
Attorneys for T. W. Withoft, Trustee of the Estate of Frank H. Sweeney, Bankrupt.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock and — min. P. M. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

Assignment of Errors.

The Colman Company, a corporation, appellant in the above-entitled matter in connection with its appeal from the order of the District Court of the United States for the Northern District of California, entered on the 5th day of December, 1910, in the above-entitled proceeding, disallowing and rejecting the claim of the Colman Company, a corporation,

theretofore filed in said proceeding, makes the following assignment of errors upon which said appellant will rely in the Circuit Court of Appeals of the United States for the Ninth Circuit, for relief from the said order made and entered in said matter as aforesaid on the 5th day of December, 1910, to wit:

I.

The Court erred in sustaining the exceptions of T. W. Withoft, trustee of the estate of Frank H. Sweeney, bankrupt, to the order of the Referee allowing the claim of said Colman Company, a corporation, in said proceeding.

II.

The Court erred in not overruling the exceptions of said T. W. Withoft, trustee of the estate of Frank H. Sweeney, to the order of the Referee allowing said claim of said Colman Company, a corporation, as filed in said proceeding.

III.

The Court erred in adjudging that the said claim of Colman Company, a corporation, as filed in said proceeding, was not a provable claim against the estate of Frank H. Sweeney, bankrupt.

IV.

The Court erred in not adjudging that the claim of Colman Company, a corporation, as filed in said proceeding, was a provable claim against the estate of Frank H. Sweeney, bankrupt.

V.

The Court erred in disallowing and rejecting the claim of Colman Company, a corporation, as filed in said proceeding.

VI.

The Court erred in not adjudging that the claim of Colman Company, a corporation, as filed in said proceeding, was entitled to allowance under the provisions of Section 63, paragraph A, subdivision IV, of the Acts of Congress Relating to Bankruptcy.

Dated this 14th day of December, A. D. 1910.

JOSEPH C. MEYERSTEIN,
Attorney for Colman Company, a Corporation, Appellant.

Due service of the within Assignment of Errors, by receipt of a true copy thereof, is hereby acknowledged at the City and County of San Francisco, State of California, in said District, this 15th day of December, A. D. 1910.

ROTHCHILD, GOLDEN & ROTHCHILD, and
JOSEPH KIRK,
Attorneys for T. W. Withoft, Trustee of the Estate
of Frank H. Sweeney, Bankrupt.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock and
— min. P. M. Jas. P. Brown, Clerk. By Francis
Krull, Deputy Clerk.

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

Order Allowing Appeal, etc.

Now at this day, the application of Colman Company, a corporation, for the allowance of an appeal

from an order given and made by the above-entitled Court on the 5th day of December, 1910, disallowing and rejecting the claim of said Colman Company, a corporation, as filed in said proceeding, having been duly presented:

IT IS ORDERED that said appeal be, and the same is hereby allowed, and that a citation issue and be served as by law provided, upon the filing of a bond by the said Colman Company, a corporation, in the sum of Five Hundred Dollars, with good and sufficient sureties to be approved by the Court or a Judge thereof.

R. S. BEAN,

Judge of the United States District Court.

Due service of the within Order Allowing Appeal, by receipt of a true copy thereof, is hereby acknowledged at the City and County of San Francisco, State of California, in said District, this 15th day of December, A. D. 1910.

ROTHCHILD, GOLDEN & ROTHCHILD, and
JOSEPH KIRK,

Attorneys for T. W. Withoft, Trustee of the Estate
of Frank H. Sweeney, Bankrupt.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock P. M.
Jas. P. Brown, Clerk. By Francis Krull, Deputy
Clerk.

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt,

Bond on Appeal.

Know All Men by These Presents, that we, Colman Company, a corporation organized under the laws of the State of California, and appellant herein, as principal, and National Surety Company, a corporation organized under the laws of the State of New York, and duly authorized to act as a surety upon this bond, as surety, are held and firmly bound unto T. W. Withoft, trustee of the estate of Frank H. Sweeney, Bankrupt, in the sum of Five Hundred Dollars (\$500.00), to be paid to said T. W. Withoft as such Trustee, his successors or assigns, for which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated the 14th day of December, A. D. 1910.

WHEREAS the above-named Colman Company, a corporation, has appealed to the Circuit Court of Appeals of the United States for the Ninth Circuit, from an order given, made and entered by the District Court of the United States for the Northern District of California, disallowing and rejecting the claim of said Colman Company, a corporation, as filed in the above-entitled proceeding, and an order

has been duly given and made by said District Court allowing said appeal and directing a citation to issue as required by law;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Colman Company, a corporation, appellant, shall prosecute said appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

COLMAN CO.

By JESSE C. COLMAN,
President.

NATIONAL SURETY COMPANY,
By FRANK L. GILBERT,
Resident Vice-President.

[Seal] Attest: C. E. OBERG,
Resident Asst. Secretary.

The within bond and surety are hereby approved this 15th day of Dec., A. D. 1910.

R. S. BEAN,
Judge of the District Court of the United States.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock P. M.
Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Citation on Appeal (Copy).]

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

United States of America,
Northern District of California,—ss.

To T. W. Withoft, Trustee of the Estate of Frank H.
Sweeney, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of California, wherein Colman Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the judgment so appealed from should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at San Francisco, in the Northern District of California, this 15th day of December, A. D. 1910.

R. S. BEAN,

Judge of the United States District Court.

Due service of the within Citation, by receipt of a true copy thereof, is hereby acknowledged at the

City and County of San Francisco, State of California, in said District, this 15th day of December, A. D. 1910.

ROTHCHILD, GOLDEN & ROTHCHILD, and
JOSEPH KIRK,

Attorneys for T. W. Withoft, Trustee of the Estate
of Frank H. Sweeney, Bankrupt.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock and
— min. P. M. Jas. P. Brown, Clerk. By Francis
Krull, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Record.]

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing and hereunto annexed thirty-one pages to contain full, true and correct copies of the Petition for Adjudication (without accompanying schedules), Order of Adjudication, Order of Court reversing Order of Referee, Notice of Appeal, Order Allowing Appeal, Bond on Appeal, Assignment of Errors and Citation, now on file in this office, together with a true and correct copy of the following documents originally filed with the United States Referee in Bankruptcy, in and for the City and County of San Francisco, and by said Referee duly transmitted to this Court, with the Referee's Certificate, viz.: Claim of Colman Company, Referee's Report on Said Claim, Petition for Review of Order of Referee, Stipulation on Petition for Review, in the case of Frank H. Sweeney, No. 6100, in Bankruptcy, and which now remain on file and of record in this office.

In witness whereof, I have hereunto set my hand, and affixed the Seal of said District Court, at San Francisco, in said District, this 12th day of January, A. D. 1911.

[Seal]

JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1946. United States Circuit Court of Appeals for the Ninth Circuit. The Colman Company (a Corporation), Appellant, vs. T. W. Withoft, Trustee in Bankruptcy of the Estate of Frank H. Sweeney, Bankrupt, Appellee. In the Matter of Frank H. Sweeney, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California.

Filed January 20, 1911.

F. D. MONCKTON,
Clerk.